UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

HOWARD OPERA HOUSE ASSOCIATES and O'NEILL, CRAWFORD & GREEN, P.C.,	:	
Plaintiffs,	:	
v.	:	Case No. 2:99-CV-140
URBAN OUTFITTERS, INC.,	:	
Defendant.	:	

OPINION AND ORDER

Pursuant to the Court's April 17, 2002 Memorandum and Order, Howard Opera House Associates ("HOHA") filed a renewed motion for attorney's fees (Doc. 279) seeking $319,883.71 in attorney's fees and expenses incurred as a result of a noise dispute between it and Urban Outfitters, Inc. ("Urban Outfitters"). A hearing was held on the motion on May 14, 2003. For the reasons described below, the Court **GRANTS in part and DENIES in part** the motion and awards HOHA $239,912.78 in attorney's fees and expenses.

I. Background

HOHA's request for attorney's fees arises from a dispute between the parties over disruptive noise produced by Urban Outfitters, a tenant in a Burlington, Vermont building owned by HOHA. In May 1999, HOHA and one of its tenants filed suit against Urban Outfitters in Vermont state court. Urban Outfitters subsequently removed the case to this court. To say

that the ensuing litigation was contentions would be a gross understatement.

HOHA's complaint, as amended, included ten counts, raising claims for nuisance, breach of contract, fraudulent concealment, constructive fraud, negligent failure to disclose, and breach of the implied covenant of good faith and fair dealing. HOHA requested equitable relief, including termination of the lease and an injunction enjoining Urban Outfitters from creating a nuisance through operation of its sound system, as well as compensatory and punitive damages on all counts. Urban Outfitters filed a counterclaim against HOHA for breach of contract, fraudulent misrepresentation, fraudulent nondisclosure, negligent misrepresentation, and breach of the implied covenant of good faith and fair dealing.

Although HOHA moved for a preliminary injunction, the parties entered into an interim stipulation regarding playing of the music on May 13, 1999. On February 2, 2001, the Court granted in part Urban Outfitters' motion for judgment on the pleadings, finding unconstitutional certain provisions of the Burlington noise ordinance. Both HOHA and Urban Outfitters then filed summary judgment motions. On August 20, 2001 the Court dismissed the parties' fraud and negligence claims and limited Urban Outfitters' breach of contract claims to certain provisions of the lease. It also excluded Urban Outfitters' claims for

compensatory and punitive damages, which were based on its remaining contract claims. Subsequently, HOHA filed a motion for trial by court stating that it sought only injunctive relief and arguing that Urban Outfitters' remaining claims were limited to the same form of remedy. Over Urban Outfitters' opposition, the Court agreed, but ordered that an advisory jury be empaneled.

A nine-day trial was held before the advisory jury from November 15, 2001 to November 30, 2001. The jury found, and the Court later entered judgment, in favor of HOHA on its nuisance count, its breach of the implied covenant of good faith and fair dealing count, and one of its breach of contract counts, which based the breach on violation of the Burlington noise ordinance. HOHA also prevailed on all of Urban Outfitters' remaining breach of contract claims and its implied covenant of good faith and fair dealing claim.[1] On April 17, 2002, the Court permanently enjoined Urban Outfitters from operating its sound system "in a manner that substantially and unreasonably interferes with other tenants' use of their space" or "unreasonably disturb[s] other tenants." Howard Opera House Assocs. v. Urban Outfitters, Inc.,

[1] Although the jury entered a verdict in favor of Urban Outfitters with regard to its implied covenant of good faith and fair dealing claim, the Court rejected this recommendation based on its determination that the verdict was the result of an impermissible argument made by Urban Outfitters' counsel during closing argument.

2:99-CV-140, slip op. at 4-5 (D. Vt. Apr. 17, 2002) (permanent injunction).[2]

Urban Outfitters appealed the judgment and the injunction. On March 5, 2003, the Court of Appeals for the Second Circuit affirmed the judgment in all respects, but vacated the injunction and remanded for greater specification of the acts restrained. Howard Opera House Assocs. v. Urban Outfitters, 322 F.3d 125, 129-30 (2d Cir. 2003). HOHA's renewed motion for attorney's fees followed.

II. Discussion

The lease between HOHA and Urban Outfitters forms the basis for HOHA's claim for attorney's fees and expenses. The lease provides:

> In any circumstances in which Tenant or Landlord incurs legal fees and expenses arising out of or resulting from any dispute with the other related to this Lease, the legal fees and expenses of the prevailing party shall be borne by the other party.

[2] Because of the likelihood of appeal and the size of the potential fee award, the Court denied without prejudice HOHA's motion for attorney's fees on the same date until after the appeals period had run. Howard Opera House, 2:99-CV-140, slip op. at 3 (memorandum and order denying without prejudice motion for attorney's fees).

Lease Art. XVIII, § 17. Under Vermont law,[3] contractual provisions awarding attorney's fees and expenses are enforced according to their terms. See Foster & Gridley v. Winner, 169 Vt. 621, 624, 740 A.2d 1283, 1287 (1999) (entry order); Roy v. Mugford, 161 Vt. 501, 514, 642 A.2d 688, 695 (1994); Ianelli v. Standish, 156 Vt. 386, 389, 592 A.2d 901, 903 (1991). The Court retains the discretion, however, to determine whether the requested award is reasonable. Roy, 161 Vt. at 514, 642 A.2d at 695.

Urban Outfitters first argues that HOHA's fees associated with the nuisance claim are not recoverable under this provision because nuisance is a tort claim and thus cannot be considered to "arise out of" or "result from" a dispute related to the lease. As a practical matter, however, not only did HOHA maintain that Urban Outfitters had breached the lease when it created the nuisance, the nuisance claim involved the same facts and legal standard as HOHA's claim of breach of contract based on violation of the Burlington noise ordinance. Thus, the same hours and expenses expended on the nuisance claim would be covered as hours and expenses expended on the contract claim upon which HOHA also

[3] The lease provides that its provisions are governed by Vermont law. Lease Art. XVIII, § 10. Moreover, in diversity cases, the substantive law of the state governs the issue of attorney's fee availability. Kaplan v. Rand, 192 F.3d 60, 70 (2d Cir. 1999).

prevailed.[4] Moreover, the language of the fee provision is broad and is not limited to breach of contract actions alone. See Ianelli, 156 Vt. at 388, 592 A.2d at 903 (although a tort, fraud claim covered by sales contract attorney's fees provision for suits arising out of enforcement of contract); see also Turtur v. Rothschild Registry Int'l, Inc., 26 F.3d 304, 309-10 (2d. Cir. 1994) (choice of law provision applying New York law to claims "arising out of or relating to" contract, covered tort as well as contract claims). Thus it is possible, given that HOHA's nuisance claim involved Urban Outfitters' use of the property pursuant to the lease, to view the fees as the result of a dispute related to the lease. See Xuereb v. Marcus & Millichap, Inc., 5 Cal. Rptr. 2d 154, 157-59 (Cal. Ct. App. 1992) (fees related to negligence, breach of fiduciary duty, concealment, and misrepresentation claims stemming from real estate transaction recoverable pursuant to purchase agreement clause covering legal

[4] Urban Outfitters' argument that HOHA's expert witness expenses are not compensable because they exceed statutory lay witness fees is also not convincing. The lease provides that HOHA may recover both "legal fees *and expenses*" incurred in connection with the litigation. Lease Art. XVIII, § 17 (emphasis added); cf. See Ianelli, 156 Vt. at 388, 390, 592 A.2d at 902, 903 (expert witness fees not recoverable to the extent they exceed statutory lay witness fees, however, the contractual provision at issue provided for a "reasonable attorney fee" and not for other expenses).

proceedings rising out of that agreement); Montoya v. Villa Linda Mall, Ltd., 793 P.2d 258, 259-60 (N.M. 1990).[5]

There is no question that HOHA was a prevailing party under the lease provision. It succeeded on nuisance, breach of the implied covenant of good faith and fair dealing, and one breach of contract count, as well as in securing injunctive relief. Cf. Texas State Teachers Assoc. v. Garland Indep. Sch. Dist., 489 U.S. 782, 792 (1989) (in context of federal civil rights litigation, purely technical or de minimis success may not support prevailing party status). There is merit, however, to Urban Outfitters' argument that although HOHA is, on the whole, a prevailing party, its fee request must be reduced to reflect the limited degree of its success. Although a Vermont court must award at least some amount of fees to the prevailing party under a contractual fee provision, it is obligated to determine the amount that constitutes a reasonable award. Roy, 161 Vt. at 514, 642 A.2d at 695-96. This is a question of fact which involves consideration of, among other factors, the results and benefits obtained by the attorney in the litigation. Id.; see Young v. N.

[5] Under similar logic, HOHA's time spent monitoring the proceeding before the Burlington Judicial Bureau regarding Urban Outfitters' April 1999 noise ordinance citation is clearly compensable under the contractual provision. Had Urban Outfitters prevailed in this proceeding, HOHA's claim of breach of the lease through violation of the ordinance would have been called into question. Thus, these legal fees and expenses can be said to have been incurred by HOHA as the result of a dispute related to the lease.

Terminals, Inc., 132 Vt. 125, 129, 315 A.2d 469, 471-72 (1974). In evaluating the reasonable award in situations where the claimant is only partially successful, the Vermont Supreme Court has held that the fee award should be computed based only on the time spent on claims or issues on which the claimant prevailed. Blodgett Supply Co., Inc. v. P.F. Jurgs & Co., 159 Vt. 222, 233, 617 A.2d 123, 129 (1992).

In the context of federal fee award provisions, courts follow a similar two-step approach: first excluding fees for any unsuccessful claims unrelated to the claims upon which the claimant succeeded; and second, if warranted, reducing the entire award to reflect the claimant's limited overall success where unsuccessful claims are interrelated with successful claims. See Hensley v. Eckerhart, 461 U.S. 424, 434-36 (1983); Grant v. Martinez, 973 F.2d 96, 101 (2d Cir. 1992); see also Blodgett, 617 A.2d at 129 (citing approvingly a Minnesota Supreme Court case applying this two-step approach). Under this approach, if the claims are not severable and the claimant has achieved "excellent" results, normally the attorney should be fully compensated for all his or her hours. Hensley, 461 U.S. at 435; Grant, 973 F.2d at 101.

In this case, a reduction in the requested award is appropriate because, although HOHA prevailed in the end, its success was significantly limited along the way. Each of HOHA's

three fraud-based counts was dismissed at summary judgment and it ultimately prevailed on only one of its five counts of breach of contract. Although HOHA originally sought compensatory and punitive damages on all counts, as well as termination of the lease, it received only injunctive relief related to noise reduction. Finally, HOHA did not prevail on various issues that arose during the litigation, such as its attempt to sustain portions of the Burlington noise ordinance.

It is not possible to separate the fees related to the fraud-based claims and contract claims on which HOHA did not prevail from those related to the claims on which it did prevail. These claims are interrelated both in terms of facts and legal theories. See Hensley, 461 U.S. at 435. HOHA's fraud claims hinged on Urban Outfitters' failure to disclose the importance of loud music to its store, and its plans to play loud music in the store, at the time the lease was negotiated and signed. This behavior was relied upon during trial to demonstrate Urban Outfitters' plan, motive, and pattern of bad faith behavior after signing the lease for purposes of the good faith and fair dealing claim on which HOHA ultimately prevailed. See Howard Opera House, 322 F.3d at 128. Moreover, there is no clear segregation in HOHA's documentation of its attorney's fees and expenses that would permit the Court to exclude hours and expenses related to

these failed claims or other issues.[6] Accordingly, the Court will not completely exclude from the award the hours and expenditures related to claims and issues on which HOHA did not prevail.

However, HOHA's ultimate result cannot be said to be "excellent," such that efforts expended on factually or legally inseparable unsuccessful claims should be fully compensated. See Hensley, 461 U.S. at 435. The Court is required to compare "the significance of the overall relief obtained" by HOHA with "the hours reasonably expended on the litigation" in making this evaluation. Hensley, 461 U.S. at 435. Here, HOHA has billed nearly $320,000. The result HOHA has obtained is an injunction, which will provide only some of the equitable relief, and none of the damages, it initially sought. Given these results, the relative simplicity of the claims and issues involved, and the size of the requested fee award, HOHA cannot be said to have achieved "excellent" results requiring compensation for

[6] Urban Outfitters claims that HOHA spent $6913.75 arguing for the vacated injunction language and requests that these hours be entirely excluded from the award. The Court's review of the billing documentation indicates, however, that many of the entries involving the injunction also include work on other aspects of the case, such as Urban Outfitters' motion for reconsideration. Thus, to the extent that HOHA could be said not to have prevailed on this issue, the Court will not exclude the requested amount from the award.

expenditures on claims on which it did not succeed.[7] In sum, I agree with Urban Outfitters that a reduction in the total requested award is merited based on its limited overall success.

I also find that such a reduction is necessary to, in effect, "trim the fat" from the request. The Court has been involved in the suit nearly from day one. Early on it was clear that the litigation had become unnecessarily contentious. This antagonistic conduct continued throughout the pendency of the case. Although both sides contributed to the unusually combative atmosphere, in my view, Urban Outfitters' contribution outstripped HOHA's. The dispute was a simple one, in essence a disagreement over music volume. It evolved into a behemoth involving more than four years of litigation in four different judicial fora, producing a file nearly four feet thick, and resulting in almost $320,000 in attorney's fees and expenses for HOHA alone. This magnitude of attorney effort and expenditure, relative to the uncomplicated issues involved, well demonstrates that the case was over-litigated and is further justification for a reduction in the total award requested. See Luciano v. Olsten Corp., 109 F.3d 111, 117 (2d Cir. 1997) (affirming fifteen

[7] The Court recognizes that achievement of injunctive relief without damages may merit a finding of "excellent" results permitting recovery of all hours. See Grant, 973 F.2d at 101 (citing Hensley, 461 U.S. at 436 n.1). However, in this case not only did HOHA fail on its claim for damages, it also did not receive all the equitable relief it sought.

percent reduction of hours expended based on unnecessarily contentious conduct between lead attorneys); Clarke v. Frank, 960 F.2d 1146, 1153 (2d Cir. 1992) (affirming reduction in attorney's fees for excessive billing where case was uncomplicated); Helbrans v. Coombe, 890 F. Supp. 227, 233 (S.D.N.Y. 1995) (reducing attorney's fees where hours expended were excessive relative to issues to be resolved).

I do not find Urban Outfitters' remaining arguments regarding the unreasonableness of the claimed award convincing, however. Contrary to Urban Outfitters' assertion, generally a prevailing party is entitled to fees incurred in bringing a motion for attorney's fees. See Valley Disposal, Inc. v. Cent. Vt. Solid Waste Mgmt. Dist., 71 F.3d 1053, 1059 (2d Cir. 1993); 10 James Wm. Moore et al., Moore's Federal Practice § 54.190[2][a][iv] (3d ed. 2003); cf. Mautner v. Hirsch, 32 F.3d 37, 39 (2d Cir. 1994) ("fees on fees" impermissible in cases involving common funds). Urban Outfitters' other allegations of excessive billing are also without merit. Its argument regarding the lack of billing differentiation between "core" versus "non-core" legal tasks performed by HOHA's attorneys relies solely on a series of cases from the District of Massachusetts and is not binding precedent on this court. Urban Outfitters also fails to cite any specific examples from HOHA's documentation of clerical work being billed at attorney rates. Nor has Urban Outfitters

pointed to any examples of HOHA's attorneys billing excessive amounts of travel time at their normal billing rates.[8] As HOHA's counsel explained at the hearing, he often does not bill for travel time, or bills less for such time when he accomplishes other work during the travel.[9]

The remaining issue is the amount by which HOHA's requested award should be reduced. Use of a percentage reduction is permissible to account for a claimant's limited overall success where the unsuccessful claims are not severable from the overall fees request. U.S. Football League v. Nat'l Football League, 887 F.2d 408, 414 (2d Cir. 1989). Similarly, a percentage reduction is an appropriate method for "trimming the fat" from an award.

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[8] Urban Outfitters has also failed to identify any specific examples of inappropriate billing for Westlaw research, postage, photocopying, and telephone bills. In general, postage, photocopying, and telephone bills are out-of-pocket expenses incurred by attorneys and ordinarily billed to clients; thus they are compensable as part of an attorney's fees award. See LeBlanc-Sternberg v. Fletcher, 143 F.3d 748, 763 (2d Cir. 1998). Similarly, there is no prohibition against compensation for computerized research fees through an application for attorney's fees. See Gen. Motors Corp. v. Villa Marin Chevrolet, Inc., 240 F. Supp. 2d 182, 189-90 (E.D.N.Y. 2002) (discussing U.S. ex rel. Evergreen Pipeline Constr. Co., Inc. v. Merritt Meridian Constr. Corp., 95 F.3d 153, 173 (2d Cir. 1996)).

[9] Urban Outfitters also faulted HOHA's fee documentation as vague, however, at the hearing the parties informed the Court that HOHA had submitted additional detailed documentation for the time periods in question. Because Urban Outfitters has not notified the Court that it continues to object to the billing documentation on this basis, it is assumed that Urban Outfitters has abandoned this argument.

Luciano, 109 F.3d at 117 (excessive and unreasonable hours can be excluded through across-the-board reduction in hours); N.Y. State Ass'n for Retarded Children v. Carey, 711 F.2d 1136, 1146 (2d Cir. 1983) (percentage reductions are "a practical means of trimming fat from a fee application" because "it is unrealistic to expect a trial judge to evaluate and rule on every entry in an application"). In this case, a twenty-five percent reduction is sufficient to make HOHA's attorney's fee request reasonable. This reduction is small enough to reflect the fact that HOHA did achieve success on some of its claims, although its results were not "excellent." At the same time the reduction is large enough to account for the fact that HOHA failed to prevail on the majority of its claims and obtained only some of the relief it sought, as well as the fact that the case was over-litigated. See U.S. Football, 887 F.2d at 415 (affirming reduction in requested award by twenty percent based on claimant's limited success); Helbrans, 890 F. Supp. at 233 (reducing by ten percent attorney's hours and disbursements where hours expended were excessive) Ragin v. Harry Macklowe Real Estate Co., 870 F. Supp. 510, 523 (S.D.N.Y. 1994) (reducing requested award by fifty percent where success in obtaining injunctive relief was incomplete, compensatory relief was less than requested, and claimant did not prevail on other significant issues in the case). The twenty-five percent cut reduces HOHA's award from $319,883.71 to $239,912.78.

III. Conclusion

Wherefore, HOHA's renewed motion for attorney's fees is **GRANTED in part and DENIED in part** (Doc. 279). Urban Outfitters shall pay HOHA $239,912.78 in compensation for attorney's fees and expenses incurred by HOHA in prosecuting and defending this action.

Dated at Burlington, Vermont this _____ day of July, 2003.

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William K. Sessions III
Chief Judge, U.S. District Court